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In the Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

PADUNGSRI PHINPATHYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent contends (Resp. Br. 1-6) that the case is moot.[1] She asserts that since her return from Thailand in April 1974, she has been physically present in the United States for a continuous period of more than seven years. Respondent claims that she is statutorily eligible for suspension of deportation because she now can satisfy the "continuous physical presence" requirement of Section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(1). On February 3, 1983, respondent sought to establish her eligibility for suspension of deportation by filing with the Board of Immigration Appeals a motion to reopen her deportation proceeding based on her assertion of a new and material fact — *i.e.*, that she has been physically present in this country since April 1974. In light of

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[1]This contention is also made by amicus curiae American Immigration Lawyers Association.

these developments, respondent argues that there is no need for this Court to decide the "continuous physical presence" issue here because even if the Court were to reverse the judgment of the court of appeals, respondent nonetheless could prevail on that issue before the BIA if the Board were to grant her motion to reopen.

Respondent's mootness contention is manifestly without merit for a number of reasons. To begin with, the case is clearly not moot because the BIA has not yet passed on respondent's motion to reopen, much less found her to have met the "continuous physical presence" requirement.[2] In addition, while it is of course true that more than seven years have elapsed since respondent's April 1974 entry, we have no way of knowing whether respondent could sustain her statutory burden of demonstrating that she has been physically present in the United States for a continuous period of at least seven years. Certainly, nothing in the record of this case provides a basis for concluding that respondent could meet this burden, and counsel's unsupported assertions in respondent's brief similarly do not establish that respondent could satisfy the "continuous physical presence" requirement.

Moreover, nothing in either the Immigration and Nationality Act or the regulations promulgated by the INS automatically entitles respondent to reopen her deportation proceeding for the purpose of filing yet another application for suspension of deportation. The Act itself does not expressly provide for a motion to reopen. The pertinent INS regulation, 8 C.F.R. 3.2, provides in relevant part that "[m]otions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence

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[2]On April 18, 1983, this Court denied respondent's motion to stay the proceedings in this case pending the Board's disposition of respondent's motion to reopen.

sought to be offered is material * * *." As the Court observed in *INS* v. *Wang*, 450 U.S. 139, 143-144 n.5 (1981),

> [t]he present regulation is framed negatively; it directs the Board not to reopen unless certain showings are made. It does not affirmatively require the Board to reopen the proceedings under any particular condition. Thus, the regulations may be construed to provide the Board with discretion in determining under what circumstances proceedings should be reopened.

The Court in *Wang* quoted approvingly from the dissenting opinion in *Villena* v. *INS*, 622 F.2d 1352, 1362 (9th Cir. 1980) (en banc), in which Judge Wallace concluded that the INS had discretion beyond requiring proof of a prima facie case:

> If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations.

Under this approach, the BIA clearly would be acting well within its discretion if it were to deny respondent's motion to reopen on the ground that the period after a finding of deportability should not be counted toward the statutory seven-year period. The Board is not required to permit deportable aliens, as a matter of course, to reopen deportation proceedings merely because they have demonstrated " 'the ability to stay out of trouble with the police for seven years.' " *INS* v. *Wang*, *supra*, 450 U.S. at 145, quoting from *Wang* v. *INS*, 622 F.2d 1341, 1352 (9th Cir. 1980)

(en banc) (Goodwin, J., dissenting). This is especially true when part of the seven-year period includes the time *following* a finding of deportability; otherwise, deportable aliens with access to legal services would have every incentive to attempt to prolong their illegal stays in this country through dilatory tactics and legal maneuvers in proceedings before the courts and the INS. See generally, *e.g.*, *LeBlanc* v. *INS*, No. 82-1829 (1st Cir. Aug. 18, 1983), slip op. 17-18; *Agustin* v. *INS*, 700 F.2d 564, 566 (9th Cir. 1983); *Muigai* v. *INS*, 682 F.2d 334, 336-337 (2d Cir. 1982); *Balani* v. *INS*, 669 F.2d 1157, 1160 (6th Cir. 1982); *Lam Chuen Ching* v. *INS*, 467 F.2d 644, 645 (3d Cir. 1972).

In sum, there is no basis for concluding that the Board will grant respondent's motion to reopen her deportation proceeding or that, if the Board grants the motion, it will determine that she is eligible for suspension of deportation. Accordingly, the case is not moot. Cf. *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), slip op. 16.[3]

2. Respondent contends (Resp. Br. 6-11) that, because the suspension of deportation remedy was designed to serve a generally "ameliorative" purpose, it follows that Congress must have intended the "continuous physical presence" requirement of Section 244(a)(1) to be construed liberally. This contention is entirely without merit, largely for the reasons discussed in our opening brief (at 20-25).

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[3]Respondent seeks to have it both ways: on the one hand, she has attempted to minimize the importance of the court of appeals' ruling by arguing that she can now obtain the same relief through a different route; on the other hand, she appears reluctant to jeopardize her victory in the court of appeals by having that court's decision reviewed by this Court. If respondent were truly confident of the success of her pending motion to reopen, she could moot the instant case by simply withdrawing her initial application for suspension of deportation. Respondent, however, has not offered to withdraw her initial application.

If respondent's contention were correct, then the "extreme hardship" requirement of the statute would also be subject to a generous construction. But in *INS* v. *Wang, supra*, this Court specifically rejected such an approach when it held that the Attorney General and his delegates are authorized to construe "extreme hardship" narrowly, and that "[s]uch a narrow interpretation is consistent with the 'extreme hardship' language, which itself indicates the exceptional nature of the suspension remedy." 450 U.S. at 145. The statutory limitation of eligibility to those who can prove that they were "*physically present* in the United States for a *continuous period* of not less than seven years" prior to their application (8 U.S.C. 1254(a)(1) (emphasis added)) is a further indication that Congress intended suspension of deportation to be an exceptional remedy.

In a recent decision, the Eleventh Circuit has expressly rejected the generous construction of the "continuous physical presence" requirement that underlies the decisions of the court of appeals in this case and in *Kamheangpatiyooth* v. *INS*, 597 F.2d 1253 (9th Cir. 1979). The court in *Fidalgo/Velez* v. *INS*, 697 F.2d 1026, 1029 (11th Cir. 1983), stated:

> The broad and liberal interpretation of "meaningful interruption" developed by the Ninth Circuit in *Kamheangpatiyooth* and *Phinpathya* contravenes the plain language and the legislative history of Section 244(a)(1). See *McColvin* v. *Immigration and Naturalization Service*, 648 F.2d 935 (4th Cir. 1981) (Congress intended that continuous physical presence requirement be applied in a rigorous manner). On its face, the statute does not provide an exception to the requirement of continuous physical presence. That this omission is deliberate is demonstrated by the legislative history of Section 244(a)(1). The predecessor statute to Section 244(a)(1), Section 19(c) of the Immigration Act of 1917, 39 Stat. 874, required that an alien have

"resided continuously" in the United States for seven or more years. When the Act was revised in 1952 Congress broadened the class of aliens who may apply for suspension of deportation but made the requirements more restrictive, by substituting continuous physical presence for continuous residence and requiring a showing of exceptional and extremely unusual hardship instead of serious economic detriment. The purpose of these amendments was to "attempt to discontinue lax practices and discourage abuses." H.R. Rep. No. 1365, 82d Cong., 2d Sess. 31, *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1682. Congress amended the latter requirement in 1962 to require only "extreme hardship," 76 Stat. 1247, but left the physical presence requirement unchanged. If Congress had intended to permit physical absences during the seven year period, it could have required that an alien have seven years' continuous residence rather than seven years' physical presence.

Respondent does not contend, nor could she, that the language of Section 244(a)(1) supports her liberal interpretation of the "continuous physical presence" requirement. Nor does respondent rely on the legislative history of the "continuous physical presence" requirement itself, which, as the Eleventh Circuit observed in *Fidalgo/Velez*, supports a narrow construction of the statute. Instead, like the court of appeals, the only legislative history on which respondent relies (Resp. Br. 9) predates the enactment of the "continuous physical presence" provision and is therefore inapposite. See the discussion in our opening brief (at 22-24).[4]

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[4]Respondent's reliance (Resp. Br. 7-8) on President Truman's veto message is similarly misplaced, in view of the fact that Congress overrode that veto in enacting the Immigration and Nationality Act. Indeed, the President's message reflects the view that Section 244(a)(1) was

Contrary to respondent's suggestion, we do not advocate a rigid and inflexible approach to construing the statute. For example, if an alien were to depart the United States for a brief period without intending to do so (see *DiPasquale* v. *Karnuth*, 158 F.2d 878 (2d Cir. 1947)), the INS would not urge that such a departure interrupts the alien's "continuous physical presence" and renders him ineligible for suspension of deportation. In addition, although we have questioned whether the standards developed by this Court in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), are applicable in the suspension of deportation context, the BIA has been applying the *Fleuti* standards to determine whether an alien's trip outside the United States was "meaningfully interruptive" of the continuity of his physical presence in this country for purposes of Section 244(a)(1). See our opening brief (at 16).

Even assuming the relevance of *Fleuti* here, however, the problem with respondent's approach — and that of the court of appeals — is that it essentially ignores the "continuous physical presence" language of the statute and extends eligibility to aliens, such as respondent, whom Congress could not conceivably have intended to be eligible for

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designed to restrict the availability of suspension of deportation. See H.R. Doc. No. 520, 82d Cong., 2d Sess. 7 (1952) (emphasis added):

> The bill would sharply restrict the present opportunity of citizens and alien residents to save family members from deportation. Under the procedures of present law, the Attorney General can exercise his discretion to suspend deportation in meritorious cases. In each such case, at the present time, the exercise of administrative discretion is subject to the scrutiny and approval of the Congress. Nevertheless, *the bill would prevent this discretion from being used in many cases where it is now available, and would narrow the circle of those who can obtain relief from the letter of the law*. This is most unfortunate, because the bill, in its other provisions, would impose harsher restrictions and greatly increase the number of cases deserving equitable relief.

suspension of deportation. Indeed, the court of appeals' broad formulation of the "continuous physical presence" requirement "exceeds the flexibility permitted by *Fleuti*." *Fidalgo/Velez* v. *INS*, *supra*, 697 F.2d at 1029.

3. Respondent asserts (Resp. Br. 11-23) that her trip to Thailand was not meaningfully interruptive of her "continuous physical presence" under the standards established in *Fleuti*. In doing so, respondent concedes that her excursion outside the United States lasted three months, a substantial period of time (especially when compared to Fleuti's two-hour jaunt across the border). In addition, respondent acknowledges that, unlike Fleuti, she procured travel documents prior to her trip, thus evidencing the deliberateness with which the trip was undertaken. Respondent contends, however, that her trip was not "meaningfully interruptive" under *Fleuti* because the "purpose" of the trip was not to engage in illegal conduct and the severity of the hardship associated with her deportation was not diminished as a result of the trip. We disagree.

a. In *Fleuti*, this Court stated that "if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful." 374 U.S. at 462. Respondent does not deny that she obtained from the United States Consul in Thailand a nonimmigrant visa as the wife of a foreign student in the United States even though her husband's student visa had expired years earlier. Thus, it is undisputed that respondent knowingly misrepresented her status in order to secure reentry into this country. Nevertheless, because the specific "purpose" of respondent's trip was not to procure a reentry visa, respondent claims that her deliberate misconduct must be disregarded as not relevant on the question whether her

absence was meaningfully interruptive.[5] Respondent's strict construction of this Court's language in *Fleuti* is unavailing. As the court in *Fidalgo/Velez* recently remarked (697 F.2d at 1030):

> Any flexibility incorporated into Section 244(a)(1) to protect a resident alien from "unsuspected risks and unintended consequences" as a result of *Fleuti* and *Wadman* only extends to "wholly innocent action." *Fleuti*, 374 U.S. at 462, 83 S.Ct. at 1812. *See McColvin, supra* (one day departure under grant of voluntary deportation in lieu of deportation "meaningfully interruptive" of continuous physical presence); *Heitland* v. *Immigration and Naturalization Service*, 551 F.2d 495 (2d Cir.), *cert. denied*, 434 U.S. 819, 98 S.Ct. 59, 54 L.Ed.2d 75 (1977) (six week visit to Germany "meaningfully interruptive" when petitioners had remained in United States far beyond expiration of six week visitor visa). As in *Heitland*, petitioner used "implicitly deceptive methods to secure re-entry in the United States," 551 F.2d at 503. The ameliorative goals of *Fleuti* do not extend to those who engage in actions that are contrary to the "policy reflected in our immigration laws." *Fleuti*, 374 U.S. at 462, 83 S.Ct. at 1812.

b. In relying on what she terms the "diminished hardship" factor, respondent fails to explain how this factor is distinguishable from the "extreme hardship" factor that Congress explicitly incorporated into the statute. See our opening brief (at 25-28). Moreover, respondent does not suggest a single example of a situation in which, upon application of the "diminished hardship" test, a deportable alien who has been in the United States for more than seven

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[5]Respondent's claim (Resp. Br. 21) that the purpose of her trip was to visit her sick mother is unsupported by the record.

years would be able to satisfy the "extreme hardship" requirement but not the "continuous physical presence" requirement (see Resp. Br. 19). Thus, under the "hardship" test adopted by the court of appeals and advocated by respondent, the length of an alien's absence during the seven year period is essentially irrelevant so long as the alien is able to establish "extreme hardship." This is a result that Congress clearly could not have intended. Accordingly, respondent's three month trip to Thailand is not rendered any less meaningfully interruptive of her "continuous physical presence" in this country because she did not take up employment, establish a household, or acquire property abroad.

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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Solicitor General

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